3827.

SUPREME COURT OF THE UNITED STATES.

No. 116.

R. F. NICHOLLS & CO., PLAINTIFF IN ERROR,

vs.

PIETRO RISO AND AL.

IN ERROR TO THE CIRCUIT COURT UNITED STATES, FOR THE EASTERN DISTRICT OF LOUISIANA.

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GIDEON, print.

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Circuit court of the United States, fifth circuit and eastern district of Louisiana.

A transcript of the record and proceedings in the case of—

FELICE PIRANDELLO and al.
vs.
R. F. NICHOLS & Co. } No. 2155.

Be it remembered that heretofore, to wit, on the 21st day of June, A. D. 1852, came into the clerk's office of said court the said Felice Pirandello, Pietro Riso, Antonio Sgobel, and Gaspar d'Anna, plaintiffs in the above entitled suit, by their attorneys, Benjamin & Micou, esquires, and filed therein their petition, in the words and figures following, to wit:

To the honorable the circuit court of the United States, for the fifth circuit and eastern district of Louisiana:

The petition of Felice Pirandello, Pietro Riso, Antonio Sgobel, and Gaspar d'Anna, all aliens, subjects of the King of the Two Sicilies, and residents of Palermo, in the island of Sicily, humbly shows: That on or about the 31st day of May, 1847, J. S. Hughes, Asa D. Gove, and R. F. Nichols & Co., merchants of New Orleans, formed a co-partnership for the purpose of importing and dealing in cargoes of fruit to be brought from the Mediterranean to New Orleans on their joint account. That with this view, the said J. S. Hughes was sent abroad to make purchases and shipments of cargo, as specified in their partnership contract, and was authorized also to take an interest in other cargoes of fruit, &c., loading for New Orleans, for the purpose of obtaining the consignment of such cargoes at New Orleans, to the extent of one-half interest in said cargoes; as the whole will fully and in detail appear by reference to the contract between said parties, of which a copy is hereto annexed, and marked exhibit "A."

Petitioners further aver that the said partnership, formed as aforesaid, entered into commercial transactions with the mercantile firm of Marsten & Co., established at Palermo aforesaid, and contracted for joint interests in cargoes shipped from Palermo aforesaid, through said house of Marsten & Co., and consigned to R. F. Nichols & Co. of New Orleans; and that during the next following seasons the said Asa D. Gove went abroad to attend to the partnership business, leaving said J. S. Hughes to act in New Orleans as his agent during his absence; and that said J. S. Hughes also acted as agent and correspondent in behalf of R. F. Nichols & Co., in whose counting-house he was employed during the absence of said R. F. Nichols in the summer of the year 1848.

Petitioners further aver, that in the month of June, 1848, the said Marsten & Co. of Palermo addressed a letter directed to Messrs. Asa D. Gove and R. F. Nichols & Co. of New Orleans, in which, referring to petitioners, the said Marsten & Co. said—"They now have the intention of sending the Francisca, Cerere, and perhaps one or two other early vessels, say to leave here early in November. They wish us to advise you of these intentions, and to let them know if you will take one-half interest, or one-third if you prefer, in the cargo, except salt or brimstone taken for ballast;" and giving other details relative to said contemplated adventure. And that the said Marsten & Co. did, by numerous subsequent letters to said Asa D. Gove and R. F. Nichols, repeat the substance of the foregoing information, and solicit their instructions on the subject of the proposed business, informing them that the vessels so intended to be loaded and consigned to them in New Orleans were the Cerere, the Francisca, and the Caroline.

Petitioners further aver, that the said Marsten & Co. addressed letters of similar import to those just mentioned to Asa D. Gove, who was then in the Mediterranean; which letters were directed to him at Calania, at Messina, and at Marseilles.

Petitioners further aver, that the offers aforesaid made to said partnership, composed of said Hughes, said Goves, and said R. F. Nichols & Co., were accepted; and said Marsten & Co. were authorized by said partnership to take a half interest in the cargoes of fruit of said three vessels, for account of said partnership; and that said R. F. Nichols & Co. forwarded to said Marsten & Co. credits on London to pay for the interest taken in said cargoes, professing a willingness to send further credits if those forwarded should prove insufficient in amount; but said Marsten & Co. did not use the credits so sent to them, informing said R. F. Nichols & Co. that your petitioners, the owners of said vessels, would themselves advance the cost of the cargoes, and were willing to receive payment on the arrival in New Orleans, when they would invest the price due for the fruit in return cargoes for their vessels.

Petitioners further aver, that during the progress of the entire business of purchasing fruit, packing and loading it on board of said vessels, the said Asa D. Gove and R. F. Nichols & Co. were kept constantly and minutely advised by said Marston & Co. of every thing that was done, of the cost of the cargoes, the terms of the purchase, the extent of the interest taken by said Marston & Co. in each cargo, for the account of said Gove, said Hughes, and said Nichols & Co.; with all which matters and things the said parties expressed themselves entirely satisfied in every respect.

Petitioners further aver, that matters remained on this footing of perfect understanding amongst all parties, until the month of January, 1849, when the cholera broke out in New Orleans, causing great mortality and destroying entirely the demand for fruit, which became almost valueless; that on the 7th January, 1849, the said R. F. Nichols & Co. wrote to said Marston & Co. not to take any further interest in any shipments but those previously named, as they apprehended a very dull

season; and on the 25th January, 1849, the cholera having produced the most disastrous effects on the New Orleans market, especially that for fruit, the said R. F. Nicholls & Co. deliberately repudiated their entire contract, informing said Marston & Co., by letter of that date, that they declined taking any interest in the cargoes of said three vessels, on the pretext known to them to be utterly false and without foundation, that their orders had been exceeded in quantity, and that they had only been offered an interest in perishable goods, and at exorbitant freights; and stating that they had transferred the consignment to F. Kennett & Co., of New Orleans. Petitioners further show, that on the arrival of the said vessels in New Orleans the captain in command of them refused to transfer the consignment, and that the said R. F. Nicholls & Co. thereupon changed their views and accepted the consignment, and received the cargoes and sold the same, and rendered accounts thereof, but they refused to pay for the portion of the cargoes loaded on their account, and paid for only half thereof, and caused the captain, under their instructions, to make tender of the other half of said portion, being one-fourth of the entire cargoes, to said J. S. Hughes, as agent of said A. D. Gove, although the said Nicholls & Co. well knew that they themselves were responsible for the entire costs of the portion of the cargo shipped on account of their said partnership, not only as being commercial partners in said adventure with Gove & Hughes, but because by the terms of the agreement with their co-partners they bound themselves to advance the whole cost, and by the terms of their letters to said Marston & Co. they agreed to take a half interest in the entire cargoes for themselves.

Petitioners further aver, that the amount now due for the one-fourth of said cargoes of said vessels is as follows, viz: For the cargo by the Cerere, fourteen hundred and nineteen dollars and fifteen cents; the cargo by the Francesca, eleven hundred and fifty-two dollars and fifty-nine cents; and the cargo by the Caroline, eleven hundred and thirty-seven dollars and twenty cents, all due on the 1st October, 1849, and amounting to a sum total of three thousand seven hundred and eight dollars and ninety-four cents, as the whole will fully and in detail appear by reference to the accounts hereto annexed, marked exhibits B, C and D.

Petitioners aver, that although said correspondence and accounts are nearly all in the name of said Marston & Co., yet petitioners are the true parties in interest in the premises; that said Gove, Hughes and Nicholls & Co. were apprised of said fact, and that said Marston & Co. acted only as agents of the parties in New Orleans, in contracting with petitioners, who were the owners of said vessels and who advanced all the money invested in the purchase and shipment of said cargoes; and it is with the consent and concurrence of said Marston & Co., that petitioners institute this suit.

Petitioners show that, by reason of the premises, said R. F. Nicholls & Co. became justly and truly indebted unto petitioners in said sum of three thousand seven hundred and eight dollars and $\frac{94}{100}$ cents, with

interest from the 1st of October, 1849, and that they refuse to pay said sum, or any part thereof.

Petitioners therefore pray that said R. F. Nicholls & Co., who are a commercial copartnership established in New Orleans, and composed of Richard F. Nicholls and Alfred Hewson, both residents of New Orleans, and citizens of Louisiana, be cited, and, after due proceedings, condemned to pay to petitioners said sum of three thousand seven hundred and eight $\frac{94}{100}$ dollars, with interest from the 1st October, 1849, and costs of suit, and for all other just relief.

BENJAMIN & MICOU, *For petitioners.*

Answer.—Filed 11*th January*, 1853.

Fifth circuit court.

F. Pirandello et als.
vs.
R. F. Nicholls & Co. and A. Hewson.

And now comes R. F. Nicholls and Alfred Hewson, the defendants, and for answer to plaintiffs' petition, they say they deny all and singular the allegations thereof, save only such as may be hereafter admitted.

They aver, that by the terms of the partnership agreement between A. D. Gove, J. S. Hughes and themselves, the adventures in Sicilian cargoes were restricted to four in number; and that the only interests the plaintiffs ever had with respondents was in Sicilian cargoes. These four, to wit, by the Francesca, the Julia, the European and the Oceana, were all purchased, despatched, received and sold prior to July, 1848; and so respondents aver the said partnership agreement, so far as concerned Sicilian cargoes, fully performed its office and became entirely extinct.

And if said agreement should be relied on, respondents aver that the correspondence of J. S. Hughes, and particularly his letter of date, New Orleans, September 23d, 1848, addressed to Marston & Company, acknowledging the receipt of their's of August 18, 1848, and proposing new adventures on joint account, was carried on and written without authority from respondents, and wholly without their knowledge or consent, and after your respondent, R. F. Nicholls, under date of August 26th, 1848, had written to said Hughes, from New York, stating his unwillingness to engage in any new adventures. The said Hughes being without authority, and the partnership having been formed for a specific purpose, already fulfilled, and the said partnership agreement having specially restricted said Hughes to the taking of interests in cargoes during his stay in Malaga and Sicily, and the said letters having been written by him when he was here in New Orleans, your respondents' domicil, they wholly deny all responsibility for engagements made in consequence of the correspondence aforesaid. And respondents specially charge, that the said Marston & Company, if they permitted themselves to be influenced by said correspondence, or

by any other not emanating from respondents personally, did so wilfully, and in their own wrong, in as much as they wrote to respondents, of date "Palermo, July 10, 1848," "We will not agree to any thing unless you give us the authority to do so."

On November 11th, 1848, respondents wrote to said Marston & company, not as members of the limited partnership aforesaid, but on their own account as a commercial firm, stating distinctly the terms on which they were willing to engage in shipments on joint account; and in their letter they advised of the opening of the credit referred to by plaintiff, and directed said Marston and company to use the same in sending cargoes to respondents' consignment, and the vessels to respondents' consignment only; and directing them not to interest respondents to the extent of more than one-half in a December cargo, and one-third in a January cargo; and then only in "mountain fruit, and the cargoes proportioned as those of the previous year. But respondents aver, the said Marston & company had then already engaged for the loading of the "Cerera" and "Francesca," as they wrote in October 10, 1848. These cargoes they did not intend respondents should be interested in, and in their letter advising *advising* of the shipments, they were silent *they were silent* touching the pretended interest of respondents, which it is averred is a mere after-thought. But if they had so intended, their act, in attempting to interest respondents, was without authority and wholly void; and the same would have been equally void had they undertaken to act on the faith of respondents' letter aforesaid, because the instructions thereof were violated, the fruit not being "mountain" fruit exclusively, the brimstone always a considerable portion of such ad being retained wholly by said Marston & Company, and the vessels not being consigned to respondents exclusively, but to A. D. Gove and themselves jointly, thereby depriving respondents of one-half of ships' commissions, and one quarter of any profit of the cargoes, and one quarter of the difference of profit between "mountain fruit" and fruit less saleable and of inferior quality.

The said Marston & Company received respondents letter of November 11th, 1848, containing these instructions, on December 15th, 1848, the day before the date of the invoice of the "Caroline's" cargo, and yet they knowingly permitted the said cargo to go forward, not consigned exclusively to respondents, and not at all in accordance with terms of the letter of November 11th, 1848, received by them as aforesaid.

The invoices and bills of lading of the cargoes of the "Cerera," "Francesca" and "Caroline" arrived in those vessels and not by mail, and therefore the said "Marston & Company" in their letters being silent as to any attempt to interest respondents in said cargoes, they were unable in their letters written before the said arrivals to remonstrate against said shipments, so far as concerned their pretended interest therein, even if said cargoes had been intended as shipments on joint account, which is wholly denied.

Respondents further show, that on January 7th, 1849, they had not

been advised by said Marston & Company, that any cargoes were in course of shipment; and then fearing an unprofitable season, and supposing said Marston & Co., pursuant to the instructions aforesaid, had possibly prepared one or two adventures, your respondents wrote on the said January 7th, 1849, directing said Marston & Co. not to engage in further adventures; and your respondents specially deni*es* that this language had any reference to the cargoes by the "Cerera," "Francesca" and "Caroline," or either of them, for respondents at that time knew nothing about them.

On January 25th, 1849, and immediately after respondents became aware of the intention of said Marston & Company, and fourteen days prior to the arrival of said vessels, or either of them, respondents wrote to Marston & Co., stating they should decline any interest in these cargoes, inasmuch as the vessels were not consigned to respondents exclusively, the cargoes were not proportioned as directed in the letter of November 11, 1848, and the perishable part only of said cargoes was offered as that in which their interest should lie; and referring to the said letter of instructions, respondents prepared the transfer of the vessels to F. Kennett & Co.

And they say, it is not true that J. S. Hughes was ever in their employment or in their office as alleged, or was ever their agent for any purpose whatever. And they deny the existence of the cholera influenced them in the premises, and charge that said Marston & Company and the plaintiffs are seeking most unjustly to involve respondents in a loss which is wholly their own.

Therefore, respondents respectfully pray to be hence dismissed with their costs, the plaintiffs claim be finally rejected, and for general relief.

And they will ever pray.

GOOLD & STANSBURY,
Attorneys.

And afterwards, on the 12th day of January, 1852, the following entry was made in the minutes:

F. Pirandello & als.
vs. } 2155.
R. F. Nicholls & Co.

On motion of J. P. Benjamin, attorney for plaintiffs, it is ordered, that the cause be assigned for trial for Thursday the 27th inst., and that defendant be notified thereof.

And on the 26th January, 1853, the following entry was made in the minutes:

Felice Pirandello & als.
vs. } 2155.
R. F. Nicholls & Co.

On motion of Benjamin & Micou, of counsel for plaintiffs, ordered, that defendants produce in court, on the trial of this cause, the follow-

ing documents and papers, to wit: 1st. The original of the partnership contract between defendants and Asa D. Gove and J. S. Hughes, of which a copy is annexed to petition. 2d. The letter book of defendants containing the copies of letters written to Marston & Co. and to the plaintiffs, between the months of August, 1848, and August, 1849. 3d. The letters written to defendants by Marston & Co., between the months of May, 1848, and August, 1849. 4th. All the correspondence between defendants and J. S. Hughes and Asa D. Gove, in the years 1848 and 1849.

And on the 27th day of January, A. D. 1853, the following entry was made in the minutes:

FELICE PIRANDELLO and als.
vs.
R. F. NICHOLS & Co. } 2155.

This cause, having been assigned for this day, was called for trial and argued by J. P. Benjamin for plaintiff, and proceeded with until two o'clock p. m., whereupon it was ordered that the cause be continued till to-morrow.

And on the 28th January, 1853, the following entry was made in the minutes:

F. PIRANDELLO and als.
vs.
R. F. NICHOLS & Co. } 2155.

This cause as continued from yesterday was called up, and by consent of parties continued till Monday, at half-after nine o'clock, a. m.

Entry in the minutes, 31st January, 1853.

F. PIRANDELLO and als.
vs.
R. F. NICHOLS & Co. } 2155.

Continued by consent of parties till to-morrow at 9½ o'clock, a. m.

Submission—recorded in the minutes February 1, 1853.

F. PIRANDELLO and als.
vs.
R. F. NICHOLS & Co. } No. 2155.

This cause as continued was resumed before the court, and after argument of counsel was submitted to the court, and taken under advisement.

Copy of rule.

Entered of record in the minutes on the 4th day of April, A. D. 1853.

FELICE PIRANDELLO and als.
vs.
R. F. NICHOLS & Co. } 2155.

On motion of E. L. Goold, attorney for defendants, it is ordered that plaintiffs show cause on Saturday, the 9th instant, at 10 o'clock, a. m.,

why a new trial should not be granted on the ground that the judgment is contrary to law and evidence.

Judgment in the above rule.

Rendered and entered of record in the minutes, April 9, 1853.

F. PIRANDELLO and als. vs. R. F. NICHOLS & Co. } 2155.

The rule herein taken by defendants for a new trial came on to be heard, the attorney of the plaintiffs in rule absent. J. P. Benjamin, attorney for defendants in rule, submitted the same without argument, whereupon it was ordered that the said rule be dismissed and a new trial refused.

Final judgment as entered of record in the judgment docket and signed.

Circuit court of the United States, fifth circuit and eastern district of Louisiana.

December term, A. D. 1852.

NEW ORLEANS, *Monday, 28th March*, 1853.

Court met pursuant to adjournment. Present, Hon. Theo. H. McCaleb, district judge.

FELICE PIRANDELLO and als. vs. R. F. NICHOLLS & Co. } No. 2155.

This cause having been argued and submitted on a former day, and the court having considered the same, doth now order, adjudge, and decree, that the plaintiffs, Felice Pirandello and als., do have and recover judgment against the defendants, R. F. Nicholls & Co., for the sum of three thousand seven hundred and eight dollars and ninety-four cents, $3,708 94, with interest thereon at the rate of five per cent. per annum from the first of October, 1849, until paid, and costs of suit.

Judgment rendered 28th March, 1853; judgment signed 11th April, 1853.

THEO. H. McCALEB, [SEAL.]
U. S. judge.

Order granting writ of error—recorded in the minutes 23d April, 1853.

Present, Hon. Theo. H. McCaleb.

F. PIRANDELLO vs. R. F. NICHOLS & Co. } 2155.

On application of E. L. Goold, attorney for the defendants, and on presenting to the court the petition of said defendants herein filed,

praying a writ of error from the final judgment rendered against them in this cause, it is ordered, that a writ of error be granted, as prayed for, returnable to the next term of the Supreme Court of the United States, on said defendants furnishing bond, with good and solvent security, in the penal sum of seven thousand dollars, conditioned according to law, the said writ to operate as a supersedeas.

Petition for writ of error—filed 22d April, 1853.

To the honorable the judges of the circuit court of the United States, for the fifth circuit and eastern district of Louisiana.

The petition of R. F. Nichols & Company shows, they are aggrieved by a final judgment rendered against them on April 9th, 1853, in favor of Felice Pirandello et als., number 2155 of the docket. Your petitioners are advised there is in said judgment error to their prejudice; and they therefore pray for a writ of error to operate as a supersedeas to the Hon. the Supreme Court of the United States, on giving bond with good and solvent security in the sum of seven thousand dollars, and for general relief.

GOOLD & STANSBURY,
Of counsel.

UNITED STATES OF AMERICA.

Circuit court of the United States, fifth circuit and eastern district of Louisiana.

CLERK'S OFFICE.

I, John W. Gurley, clerk of the circuit court of the United States, for the fifth circuit and eastern district of Louisiana, do hereby certify, that the foregoing pages contain and form a full, complete, true and perfect transcript of the record and proceedings had in the case of Felice Pirandello and als. vs. R. F. Nicholls & Co., No. 2155 of the docket, so far as the same now remain of record or on file in said court.

Witness my hand and the seal of said court, at the city of New Orleans, this 15th day of July, A. D. 1853.

[SEAL.] J. W. GURLEY, *Clerk.*

I. Theodore H. McCaleb, United States judge for the eastern district of Louisiana, do hereby certify, that John W. Gurley, whose name is signed to the above certificate as clerk of the circuit court of the United States, for the fifth circuit and eastern district of Louisiana, was at the time of signing said certificate, and is now, the clerk of said court; that said certificate is in due form of law, and that full faith and credit are due to his official attestations as such clerk.

Given under my hand and seal, at the city of New Orleans, in said district, this 15th day of July, A. D. 1853.

THEO. H. McCALEB, [SEAL.]
U. S. Judge.

Writ of error.

UNITED STATES OF AMERICA, *ss.*

The president of the United States, to the honorable the judges of the circuit court of the United States, in and for the fifth circuit, and holding sessions for the eastern district of Louisiana, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or one of you, between Felice Pirandello, Pietro Riso, Antonio Sgobel and Jaspare D'Anna and R. F. Nicholls & Co., a commercial firm composed of Richard F. Nicholls and Alfred Hewson; a manifest error hath happened, to the great damage of the said R. F. Nicholls & Co., as by their complaint appears: we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the said Supreme Court to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the honorable Roger B. Taney, chief justice of the said Supreme Court of the United States, this 28th day of May, [SEAL.] in the year of our Lord one thousand eight hundred and fifty-three.

J. W. GURLEY,
Clerk of the United States circuit court for eastern district of Louisiana.

Citation in error.

The United States of America, to Pietro Riso, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the city of Washington, on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the 5th circuit and eastern district of Louisiana, wherein R. F. Nicholls & Co., are plaintiffs in error, and you et als. are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Roger B. Taney, chief justice of the Supreme Court of the United States, this 28th day of May, in the year of our Lord one thousand eight hundred and fifty-three.
[SEAL.]

THEO. H. McCALEB,
U. S. judge.

Marshal's return.

Received May 28th, 1853, and on the same day I served a copy of the within citation on Pietro Riso—he being without the eastern district of Louisiana—by handing the same to J. P. Benjamin, esq., of the firm of Messrs. Benjamin and Micou, the attorneys of said Riso, in person, at New Orleans.

M. MARIGNY, *U. S. M.*
By EMILE MARY, *Deputy.*

Citation in error.

The United States of America, to Felice Pirandello, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the city of Washington, on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States, for the fifth circuit and eastern district of Louisiana, wherein R. F. Nicholls & Co. are plaintiffs in error, and you et als. are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Roger B. Taney, chief justice of the Supreme Court of the United States, this 28th day of May, in the year of our Lord one thousand eight hundred and fifty-three.

THEO. H. McCALEB, *U. S. judge.*

Marshal's return.

Received, May 28th, 1853, and on the same day I served a copy of the within citation on Felice Pirandello—he being without the eastern district of Louisiana—by handing the same to J. P. Benjamin, esqr., of the firm of Messrs. Benjamin & Micou, the attorneys of said Pirandello, in person, at the city of New Orleans.

M. MARIGNY, *U. S. M.*
By EMILE MARY, *D'y marshal.*

Citation in error.

The United States of America, to Jaspare D'Anna, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the city of Washing-